Supreme Court, U.S.
FILED
001038 DEC 20 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SPECIALIST HECTOR RODRIGUEZ, U.S. ARMY, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. NARDOTTI, JR.*
Major General, U.S. Army, Retired

ADELE H. ODEGARD
Colonel, U.S. Army
Chief, Defense Appellate Division

T. MICHAEL GUIFFRÉ
STEPHEN S. ANDERSON, JR.
NORAH D. MOLNAR
Attorneys

JONATHAN F. POTTER
Major, U.S. Army
SEAN S. PARK
Captain, U.S. Army
ARUN J. THOMAS
Captain, U.S. Army
Attorneys

Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

U.S. Army Legal Services Agency
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5286

* Counsel of Record

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

59 pp

QUESTION PRESENTED

Whether military courts-martial may properly disregard the federal common law psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), where Congress and the President have determined that common law privileges recognized in the trial of criminal cases in the United States district courts generally shall apply to trials by courts-martial.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Petition	4
Conclusion	21
Appendix A	1a
Appendix B	15a
Appendix C	25a

TABLE OF AUTHORITIES

Cases:

Doe v. Diamond, 964 F.2d 1325 (2d Cir. 1992)	12
Fox v. The Gates Corp., 179 F.R.D. 303 (D.Co. 1998)	12
Fritsch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal.), *modified*, 196 F.R.D. 562 (S.D. Cal. 1999)	12
Ghaprial v. Quorum Health Resources, Inc., 1999 U.S. Dist. LEXIS 325 (E.D. La. 1999)	11
Jaffee v. Redmond, 518 U.S. 1 (1996)	*passim*
Loving v. United States, 517 U.S. 748 (1996)	9
Solorio v. United States, 483 U.S. 435 (1987)	9
Swidler & Berlin v. United States, 524 U.S. 399 (1998)	7
United States v. Demmings, 46 M.J. 877 (Army Ct. Crim. App. 1997)	10
United States v. English, 47 M.J. 215 (C.A.A.F. 1997)	16
United States v. Flack, 47 M.J. 415 (C.A.A.F. 1998)	16
United States v. Glass, 133 F.3d 1356 (10th Cir. 1998)	7
United States v. Manns, 54 M.J. 164 (C.A.A.F. 2000)	14-15
United States v. Paaluhi, 50 M.J. 782 (N.M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000)	16
United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998)	20
United States v. Scheffer, 523 U.S. 303 (1998)	20
United States v. Schwensow, 151 F.3d 650 (7th Cir. 1998)	7

Cases—Continued: Page

United States v. Stevens, 1999 CCA LEXIS 198 (A.F. Ct. Crim. App. Jun. 4, 1999), *petition for review granted*, 1999 CAAF LEXIS 2032 (C.A.A.F. Oct. 26, 1995) 15
Vinson v. Humana, Inc., 190 F.R.D. 624 (M.D. Fl. 1999) ... 11

Constitution, Statutes, Regulations and Rules:

U.S. Const.
Art. I, §8, cl. 14 5
Art. II, §2 5
Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 801 *et seq.*)
Art. 1, 10 U.S.C. § 801 4
Art. 26, 10 U.S.C. § 826 4
Art. 36, 10 U.S.C. § 836 ..... *passim*
Art. 66, 10 U.S.C. § 866 ..... 4, 20
Art. 67, 10 U.S.C. § 867 ..... 1, 4, 20
Art. 115, 10 U.S.C. § 915 2
Art. 134, 10 U.S.C. § 934 3
28 U.S.C. § 1259 1
Executive Orders
No. 13140, 64 Fed. Reg. 55,115 (1999) 15
No. 12473, 49 Fed. Reg. 17,152 (1984) 6
Fed. R. Evid.
Rule 501 7
Mil. R. Evid.
Rule 101 7
Rule 501 ..... *passim*
Rule 502 6
Rule 503 6
Rule 504 6
Rule 513 ..... *passim*
Manual for Courts-Martial (MCM), United States (2000 ed.), app. 22, Analysis of the Military Rules of Evidence ..... *passim*

Miscellaneous: Page

Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183 (1972) 10
Dep't of the Army Pamphlet 600-4, Army Medical Department Officer Professional Development and Utilization (May 1977) 13
Dru Brenner-Beck, *"Shrinking" the Right to Everyman's Evidence: Jaffee in the Military*, 45 A.F. L. Rev. 201 (1998) 13
Norman J. Singer, Sutherland Statutory Construction (6th ed. 2000) 18
Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, Army Law. 27 (January 1995) 9
Stephen A. Saltzburg *et al.*, Military Rules of Evidence Manual (4th ed. 1997) 12

In the Supreme Court of the United States

No. 00-____

SPECIALIST HECTOR RODRIGUEZ, U.S. ARMY, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

Specialist Hector Rodriguez, by and through counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 54 M.J. 156. The opinion of the U.S. Army Court of Criminal Appeals (App., *infra*, 15a-24a) is reported at 49 M.J. 528.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution, the Uniform Code of Military Justice ("UCMJ"), the Military Rules of Evidence ("Mil. R. Evid.") and the Manual for Courts-Martial ("MCM") are set forth in the Appendix at App., *infra*, 25a-32a.

STATEMENT

As the court of appeals noted, the case *sub judice* presented an "issue of first impression in the armed forces," that is, whether the federal common law psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), is applicable to trials by courts-martial. App., *infra*, 17a-18a.

Specialist Hector Rodriguez deployed with his unit to Bosnia in support of Operation Joint Endeavor. On May 2, 1996, upon being told by his wife that she wanted a divorce, Specialist Rodriguez went to an empty bunker, loaded one round into his M249 squad automatic weapon, tied a cord to the trigger, and propped the weapon up facing him, preparing to shoot himself. App., *infra*, 15a. The weapon subsequently discharged, shooting Specialist Rodriguez in the abdomen. *Id.*

Specialist Rodriguez was evacuated to Landstuhl Regional Medical Center in Germany for medical treatment. *Id.* During this medical treatment, he received psychiatric evaluation and counseling from Dr. Alfano, a licensed psychiatrist and GS-13 federal civilian physician. *Id.*

A military commander charged Specialist Rodriguez with malingering by intentional infliction of self-injury for the purpose of avoiding work, duty or service. *See* 10 U.S.C. § 915. A military judge sitting as a general court-martial tried

Specialist Rodriguez at a contested trial in January 1997. At trial, Specialist Rodriguez' defense was that, at the last minute, he abandoned his attempt to shoot himself, but the weapon accidentally fired while he was retrieving it. App., *infra*, 15a.

The Army called Dr. Alfano as a witness to testify against Specialist Rodriguez regarding statements Specialist Rodriguez made to him while undergoing psychiatric treatment. Defense counsel challenged the admissibility of Specialist Rodriguez' statements to Dr. Alfano, asserting that they were protected by the federal common law psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). App., *infra*, 15a. The military judge denied the motion to suppress Dr. Alfano's testimony, ruling that under Mil. R. Evid. 501 and Article 36 of the UCMJ, 10 U.S.C. § 836, the common law psychotherapist-patient privilege is not applicable in the military, at least for a military psychiatrist. App., *infra*, 15a. Thereafter, Dr. Alfano testified about Specialist Rodriguez' admissions of intentional self-injury. Dr. Alfano's testimony was the only testimony directly contradicting the defense theory that the weapon discharge was accidental.

The military judge found Specialist Rodriguez not guilty of malingering – which requires the intent to avoid work, duty or service – but guilty of self-injury without intent to avoid service, a violation of 10 U.S.C. § 934. App., *infra*, 15a. The military judge sentenced Specialist Rodriguez to a dishonorable discharge, confinement for 354 days, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. *Id.* The court-martial convening authority approved the sentence. *Id.*

Specialist Rodriguez appealed his conviction, asserting that the military judge erred when he ruled that the common law psychotherapist-patient privilege could not be claimed in courts-martial. On October 30, 1998, the Army Court of Criminal Appeals affirmed the findings of guilty and the

sentence. App., *infra*, 14a-23a. On September 25, 2000, a divided court of appeals affirmed the findings and the sentence, holding that the military judge did not err in admitting Dr. Alfano's testimony. App., *infra*, 1a-13a. The stated basis for the court of appeals' ruling is, *inter alia*, that recognizing the common law psychotherapist-patient privilege would conflict with a military evidentiary rule that rejects a general physician-patient privilege. Only two of the five judges on the court of appeals rendered the opinion of the court, with a third judge concurring in part and in the result. *Id.*

REASONS FOR GRANTING THE PETITION

The psychotherapist-patient privilege is applicable to the military justice system. By enacting 10 U.S.C. § 836, Congress established a clear mandate that privilege rules recognized in federal courts shall apply to courts-martial proceedings so far as the President determines that such application is "practicable." Moreover, the President, by his authority as Commander in Chief and pursuant to 10 U.S.C. § 836, determined that recognition of federal common law privileges is practicable and that, with certain inapplicable exceptions, common law privileges may be claimed in courts-martial.

Despite the fact that the decision whether to recognize a privilege in the military rests with Congress and the President – and not the military courts[1] – by refusing to recognize the federal common law psychotherapist-patient privilege, the

---

[1] The military courts consist of the Court of Appeals for the Armed Forces, the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, the Coast Guard Court of Criminal Appeals, and the military judges who are detailed to preside over general or special courts-martial. *See* 10 U.S.C. §§ 801(10), 826, 866 and 867.

military courts have failed to appreciate and enforce the President's considered determination that federal common law privileges may be claimed in courts-martial proceedings. In particular, even though this Court recently recognized in its landmark decision in *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), that there is a federal common law psychotherapist-patient privilege, the military courts have refused to allow service members to claim the privilege in courts-martial proceedings. Instead, the military courts have created their own rules for courts-martial that are directly contrary to the rules properly promulgated by Congress and the President. This Court should exercise its supervisory power in this instance to ensure that the military courts do not preempt and frustrate the constitutional and statutory scheme that empowers Congress and the President to determine the evidentiary rules for courts-martial.

The President's authority to prescribe the rules for courts-martial is well-settled. Not only does the Constitution establish that the President is the Commander in Chief of the Armed Forces, U.S. Const., Art. II, §2, but Congress also has expressly established that the President is the authority empowered to promulgate rules of evidence for trials by courts-martial.[2] 10 U.S.C. § 836. Part of this congressional mandate is that the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the Uniform Code of Military Justice]." 10 U.S.C. § 836(a). Thus, Congress established a clear framework by which the President, and not the military courts, is vested with the authority to promulgate evidentiary rules for courts-martial, and directed the President, to the extent practicable, to apply the same law

---

[2] The Constitution grants to Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, §8, cl. 14.

and evidentiary rules recognized by the federal courts.

Pursuant to this authority, the President promulgated the Military Rules of Evidence, which are set forth in the Manual for Courts-Martial ("MCM").[3] In particular, the President promulgated Military Rule of Evidence 501, which recognizes four sources of privileges applicable to courts-martial: (1) the Constitution of the United States, (2) an Act of Congress, (3) the MCM, and (4) "those privileges recognized in common law pursuant to Federal Rules of Evidence 501 with some limitations."[4] MCM, United States (2000 ed.), Analysis of the Military Rules of Evidence, app. 22 (hereinafter "Analysis"), at A22-38.[5]

At his court-martial, Specialist Rodriguez invoked the common law psychotherapist-patient privilege pursuant to Military Rule of Evidence 501(a)(4). This Rule provides that any person may claim a privilege derived from "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of

---

[3] Executive Order No. 12473, 49 Fed. Reg. 17,152 (1984), as amended.

[4] There are only two limitations to Mil. R. Evid. 501(a)(4) that would enable a military court to refuse a claim of privilege based on federal common law: (1) if the application of federal common law principles in trials by courts-martial is not "practicable," and (2) if the application of such principles is "contrary to or inconsistent with" the UCMJ, the Military Rules of Evidence or the MCM. Mil. R. Evid. 501(a)(4). As explained *infra*, neither of these limitations preclude application of a federal common law psychotherapist-patient privilege in courts-martial proceedings.

[5] The President also established several enumerated privileges that may be claimed at courts-martial. *See, e.g.*, Mil. R. Evid. 502 (lawyer-client privilege), 503 (communications to clergy) and 504 (husband-wife privilege). Collectively, Mil. R. Evid. 501 and the enumerated evidentiary privileges provide the "certainty and stability necessary for military justice." MCM, Analysis, at A22-38.

such principles in trials by courts-martial is practicable and not contrary to or inconsistent with" the UCMJ, the Military Rules of Evidence or the MCM. Mil. R. Evid. 501(a)(4); *see also* Mil. R. Evid. 101(b). Federal Rule of Evidence 501 does not specifically enumerate which privileges are applicable in the federal courts, but instead provides that evidentiary privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The Analysis clarifies that, given the relationship between Mil. R. Evid. 501 and Fed. R. Evid. 501, the military rule was promulgated to provide for the continuation of common law in the privilege area and recognizes that privileges applicable to courts-martial may evolve over time. *See* MCM, Analysis, at A22-37 to A22-38.

In the landmark decision *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), this Court recognized the applicability of the common law psychotherapist-patient privilege under Fed. R. Evid. 501 to proceedings in federal courts.[6] This Court held that confidential communications made in the course of treatment and diagnosis between a patient and licensed psychiatrists, psychologists, and social workers are protected from compelled disclosure. *Id.* Thus, in light of the decision in *Jaffee* and the President's prior determination that federal common law privileges may be claimed in courts-martial, Specialist Rodriguez' invocation of the psychotherapist-patient privilege must be duly recognized.

---

[6] Although *Jaffee* was a civil action, its holding applies to criminal proceedings in federal courts as well. In *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998), the Supreme Court found that "there is no case authority for the proposition that the [attorney-client] privilege applies differently in criminal and civil cases." Several Circuits have recognized that the psychotherapist-patient privilege applies in both criminal and civil cases. *E.g., United States v. Schwensow*, 151 F.3d 650, 656-57 (7th Cir. 1998); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

Despite Congress' requirement that federal evidentiary rules shall apply to courts-martial proceedings where practicable, the President's prior determination that federal common law privileges may be claimed in courts-martial proceedings pursuant to Mil. R. Evid. 501(a)(4) and this Court's decision in *Jaffee* recognizing a federal common law psychotherapist-patient privilege, the military courts have refused to recognize that the common law psychotherapist-patient privilege may be claimed in courts-martial proceedings. The military courts are the sole remaining courts that refuse to join the otherwise universal judicial development in this fundamental area of the law that culminated in this Court's recognition of a federal common law psychotherapist-patient privilege.[7] By erroneously relying on an inapplicable exception to Mil. R. Evid. 501(a)(4),[8] the military courts also are out of step with and have refused to follow the Executive Order of the President and Commander in Chief issued prior to Specialist Rodriguez' court-martial that promulgated Mil. R. Evid. 501(a)(4) and established that federal common law privileges may be claimed in courts-martial proceedings.

It is necessary for this Court to exercise its supervisory power over the military courts in this case because the military courts have failed to abide by the rules established by Congress and the President that permit members of the U.S. Armed Forces to invoke recognized common law privileges –

---

[7] Even prior to the Supreme Court's decision in *Jaffee*, the federal courts, all fifty states and the District of Columbia recognized the psychotherapist-patient privilege in one way or another. *Jaffee*, 518 U.S. at 12, 18.

[8] As discussed *infra*, the court of appeals trumped the application of Mil. R. Evid. 501(a)(4) to recognize the common law psychotherapist-patient privilege in courts-martial proceedings by relying on an flawed interpretation of Mil. R. Evid. 501(d), which only precludes recognition of the separate and distinct *physician*-patient privilege.

including the psychotherapist-patient privilege – in courts-martial proceedings. Specifically, the military courts have not deferred to and followed (1) Congress' decision that federal evidentiary rules shall apply to courts-martial proceedings whenever practicable; (2) Congress' decision that the President – not the military courts – shall determine the evidentiary rules applicable to courts-martial proceedings, and (3) the President's determination, pursuant to his constitutional and statutory authority, that federal common law privileges may be claimed in courts-martial proceedings.

"There is abundant authority for according Congress and the President ... deference in the regulation of military affairs." *Loving v. United States*, 517 U.S. 748, 777-78 (1996) (Thomas, J., concurring). Indeed, as noted by the Honorable Sam Nunn, the former Chairman of the Senate Armed Services Committee, "[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence." Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, Army Law. 27, 31 (January 1995) (citations and internal quotation marks omitted). This Court has repeatedly "adhered to this principle of deference in a variety of contexts where ... the constitutional rights of servicemen were implicated." *Solorio v. United States*, 483 U.S. 435, 448 (1987) (collecting cases). Therefore, Congress' enactment of 10 U.S.C. § 836, and the President's promulgation of Mil. R. Evid. 501(a)(4) pursuant to 10 U.S.C. § 836, should be accorded judicial deference, as well. As the military courts have refused to give Mil. R. Evid. 501(a)(4) its proper force and effect, this Court's intervention is necessary to preclude the military courts from usurping the authority of Congress and the President.

In the case *sub judice*, the court of appeals erroneously held that despite the promulgation of Mil. R. Evid. 501(a)(4) and this Court's decision in *Jaffee*, a "psychotherapist-patient privilege would be contrary to and inconsistent with Mil. R. Evid. 501(d)." App., *infra*, 8a. Thus, the court of appeals

relied on the second exception to claiming a federal common law privilege pursuant to Mil. R. Evid. 501(a)(4).

Military Rule of Evidence 501(d) provides that "[n]otwithstanding any other provisions of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." Mil. R. Evid. 501(d). The court of appeals explained that "[t]he President's use of the term, 'physician,' in Mil. R. Evid. 501(d) includes psychiatrists and medical officers which include a broad range of military personnel who were not physicians, including those who are psychotherapists." App., *infra*, 7a-8a. The court of appeals then concluded that recognition of a psychotherapist-patient privilege would be contrary to Mil. R. Evid. 501(d) because "the term 'physician' includes a psychiatrist." App., *infra*, 8a.

The physician-patient and the psychotherapist-patient privileges are separate and distinct privileges.

The court of appeals' interpretation of Rule 501(d) – equating the psychotherapist-patient privilege with the physician-patient privilege – is unprecedented and contrary to the plain language and intent of the Rule. Even the Army Court notes that "it is clear that the psychotherapist-patient privilege has been recognized since at least 1972 as separate and distinct from the physician-patient privilege."[9] *United States v. Demmings*, 46 M.J. 877, 883 (Army Ct. Crim. App. 1997). Thus, while the President promulgated Rule 501(d) only to "prevent[] the application of a *doctor*-patient

---

[9] In 1972, the Supreme Court transmitted to Congress proposed federal rules of evidence. The Court recommended that Congress recognize a psychotherapist-patient and eight other specified privileges, but did not recommend recognition of a "general physician-patient privilege." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

privilege," commonly referred to as the physician-patient privilege, Rule 501(d) does not preclude recognition of the separate and distinct *psychotherapist*-patient privilege. MCM, Analysis, at A22-38 (emphasis added).

Indeed, this Court itself explained the basis for distinguishing between patients' relationships with physicians and psychotherapists in its *Jaffee* opinion, recognizing that confidentiality of psychotherapist-patient communications is imperative for successful treatment:

> Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patients, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.

518 U.S. at 10.

Other federal courts also have consistently held that the psychotherapist-patient privilege and the physician-patient privilege are separate and distinct. For example, after acknowledging that the Fifth Circuit does not recognize the physician-patient privilege, the District Court for the Eastern District of Louisiana held that "no existing federal law protects the medical records that plaintiff seeks from discovery, except to the extent they may be protected by the psychotherapist/patient privilege recognized in *Jaffee* . . . ." *Ghaprial v. Quorum Health Resources, Inc.*, 1999 U.S. Dist. LEXIS 325 at *5-6 (E.D. La. 1999); *see also Vinson v. Humana, Inc.*, 190 F.R.D. 624, 626 (M.D. Fl. 1999) (holding that psychotherapist-patient privilege applies to substance of confidential communications between plaintiff and therapist, but does not apply to "the various other documents and treatment notes comprising a typical clinical record that do

not memorialize the confidential communications between a psychotherapist and his/her patients in the course of diagnosis or treatment") (quotation omitted); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 618 (S.D. Cal.), *modified*, 196 F.R.D. 562 (S.D. Cal. 1999) (providing separate analyses for confidentiality of psychological/ psychiatric records pursuant to psychotherapist-patient privilege and medical records pursuant to physician-patient privilege); *Doe v. Diamond*, 964 F.2d 1325, 1328 (2d Cir. 1992), ("[I]t can hardly be disputed that communications between a patient and a psychotherapist typically involve far more intensely personal information than communications to other kinds of doctors, a fact that accounts for the somewhat wider recognition of a privilege in the case of psychotherapists than in the case of physicians generally." (citation omitted) (cited in *Jaffee*, 518 U.S. at 7)); *Fox v. The Gates Corp.*, 179 F.R.D. 303, 305 (D.Co. 1998) (analyzing confidentiality of communications to psychotherapist pursuant to psychotherapist-patient privilege and confidentiality of medical records under physician-patient privilege).

Independent analysis of the physician-patient privilege and the psychotherapist-patient privilege – specifically in the context of Mil. R. Evid. 501 – by objective academics also substantiates that the privileges are separate and distinct. Specifically, Professors Saltzburg, Schlueter and Schinasi have concluded that a narrow psychotherapist-patient privilege, rather than a broader physician-patient privilege, would not be barred by Mil. R. Evid. 501(d) "in light of the extraordinary need for confidentiality between psychotherapist and patient that is as important in military as in civilian life." Stephen A. Saltzburg *et al.*, Military Rules of Evidence Manual, at 630 (4th ed. 1997).

In sum, the psychotherapist-patient privilege is and has been treated as separate and distinct from the physician-patient privilege, and this distinction is the product of

significant differences in the nature of the treatment provided by psychotherapists and physicians.

The court of appeals' decision is premised on the erroneous conclusion that the term "physician" includes non-physicians.

The court of appeals relies on the faulty premise that "[t]he President's use of the term, 'physician,' in Mil. R. Evid. 501(d) includes psychiatrists and medical officers which include a broad range of military personnel *who were not physicians*, including those who are psychotherapists." App., *infra*, 7a-8a (emphasis added). On its face, Rule 501(d) applies only to information acquired by "a medical officer or civilian physician in a professional capacity." Mil. R. Evid. 501(d). The term "physician" cannot fairly be read to encompass health care professionals who are not licensed physicians, such as physicians' assistants, therapists, social workers and nurses. The court of appeals cites no authority for its determination that Mil. R. Evid. 501(d) applies to persons who are not physicians, and there is no suggestion in either the black letter rule or the Analysis to the Military Rules of Evidence that Mil. R. Evid. 501(d) applies to health care professionals who are not licensed physicians.[10]

The court of appeals failed to appreciate that the psychotherapist-patient privilege protects the confidentiality of certain communications based upon the nature of the relationship, not the status of the person to whom disclosures are made. *See Jaffee*, 518 U.S. at 15-17. Recognizing this distinction, this Court concluded that the federal common law

---

[10] The term "medical officer" also traditionally includes only military physicians. Dru Brenner-Beck, *"Shrinking" the Right to Everyman's Evidence: Jaffee in the Military*, 45 A.F. L. Rev. 201, 232 (1998) (citing Dep't of the Army Pamphlet 600-4, Army Medical Department Officer Professional Development and Utilization, paras. 2-4c & 8-2d (May 1977)).

psychotherapist-patient privilege extends to communications made to social workers who are not licensed physicians.[11] *Id.*

Because Mil. R. Evid. 501(d) does not apply to non-physicians, the court of appeals' analysis leads to the bizarre result that information acquired by health care professionals who are not licensed physicians would be privileged under Rule 501(a)(4), but the same information acquired by a licensed physician would not be privileged by application of Mil. R. Evid. 501(d). It is axiomatic that the President did not promulgate the Military Rules of Evidence to deter service members from obtaining psychotherapy from the most qualified professionals. Therefore, the court of appeals' reliance on Mil. R. Evid. 501(d) to avoid recognition of the psychotherapist-patient privilege under Mil. R. Evid. 501(a)(4) is misplaced.

In a strong dissent by two of the five members of the court of appeals, Judge Gierke, joined by Senior Judge Cox, determined that Mil. R. Evid. 501(d) did not preclude recognition of a federal common law psychotherapist-patient privilege pursuant to Mil. R. Evid. 501(a)(4). App., *infra*, 12a-14a. The dissenting judges concluded that:

> there is no justification in law or policy for denying [Specialist Rodriguez] the protection of the common-law privilege recognized by the Supreme Court in *Jaffee*. I would hold that under Mil. R. Evid. 501(a)(4), [Specialist Rodriguez] was entitled to invoke that common-law privilege. The majority denies him that right.

App., *infra*, 14a. In *United States v. Manns*, 54 M.J. 164 (C.A.A.F. 2000), Senior Judge Cox also wrote:

> Although a majority of this court has denied servicemembers the very protection against

---

[11] The President also defined the term "psychotherapist" to include social workers who are not licensed physicians. Mil. R. Evid. 513(b)(2).

> intrusions into their private and confidential communications with their mental health counselors that their fellow citizens enjoy in every other federal court in the land, I would find the privilege exists.

Id. at 167 (Cox, S.J., concurring in the result).

The President's promulgation of Mil. R. Evid. 513 demonstrates that Rule 501(d) does not preclude recognition of the psychotherapist-patient privilege.

The court of appeals' error in concluding that recognizing the psychotherapist-patient privilege would be inconsistent with Rule 501(d) is further underscored by the President's subsequent promulgation of a military evidentiary rule enumerating a psychotherapist-patient privilege, *notwithstanding* Rule 501(d). Pursuant to his authority under Article 36, 10 U.S.C. § 836, the President issued an Executive Order prescribing Mil. R. Evid. 513. Executive Order No. 13140, 64 Fed. Reg. 55,115 (1999). By promulgating this evidentiary rule, the President established an enumerated psychotherapist-patient privilege in all cases arising under the UCMJ.[12] *Id.* at 55,116.

Prior to the President's promulgation of Rule 513, all of the military service courts had cited Mil. R. Evid. 501(d) as a basis for refusing to apply *Jaffee*'s recognition of a federal common law psychotherapist-patient privilege to courts-martial proceedings. *See United States v. Stevens*, 1999 CCA LEXIS 198, at *5-9 (A.F. Ct. Crim. App. Jun. 4, 1999), *petition for review granted*, 1999 CAAF LEXIS 2032

---

[12] Mil. R. Evid. 513 only applies to statements made after November 1, 1999. Executive Order No. 13140, 64 Fed. Reg. 55,115, 55,119-20 (1999). As a result, persons claiming privilege for psychotherapist-patient communications occurring before November 1, 1999, must rely on the federal common law privilege recognized in *Jaffee*.

(C.A.A.F. Oct. 26, 1995); *United States v. Paaluhi*, 50 M.J. 782, 786 (N.M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000); *and* the Army Court's decision below, at App., *infra*, 16a, 21a-23a. In *dicta*, the court of appeals also had indicated that it would rely on Mil. R. Evid. 501(d) to prevent recognition of a psychotherapist-patient privilege. *See United States v. English*, 47 M.J. 215, 216-17 and 217 n.2 (C.A.A.F. 1997); *United States v. Flack*, 47 M.J. 415, 417 (C.A.A.F. 1998).

After the military courts issued these opinions interpreting the application of *Jaffee* to the military, the President promulgated Rule 513 to "clarif[y] military law in light of the Supreme Court decision in *Jaffee*...." MCM, Analysis, at A22-44. Despite the clear posture of the military courts that Rule 501(d) is contrary to and inconsistent with recognition of the psychotherapist-patient privilege in courts-martial proceedings, it is significant that the President did *not* amend Rule 501(d) when he established the enumerated psychotherapist-patient privilege.

The President's promulgation of Mil. R. Evid. 513 without amending Rule 501(d)'s prohibition of a physician-patient privilege reflects that Rule 501(d) is not, and never was, inconsistent with recognition of the psychotherapist-patient privilege in courts-martial proceedings. In fact, the Analysis to the Military Rules of Evidence, which the President amended in the same Executive Order, specifically provides that the psychotherapist-patient privilege is distinct from the physician-patient privilege precluded by Mil. R. Evid. 501(d):

> Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces.

MCM, Analysis, at A22-44. Another revised section of the Analysis states that "[t]he privileges expressed in Rule 513 and Rule 302 ... are not physician-patient privileges and are not affected by Rule 501(d)." *Id.* at A22-38. Thus, the President amended the Analysis to the Military Rules of Evidence to explicitly confirm that the psychotherapist-patient privilege is not a doctor-patient privilege and is not precluded by Rule 501(d). For this reason alone, the court of appeals' holding – which is based on the erroneous premise that the President intended to reject a psychotherapist-patient privilege by prescribing Mil. R. Evid. 501(d) – is flawed and should be overturned.

The court of appeals' error in interpreting Mil. R. Evid. 501(d) as precluding members of the U.S. Armed Forces from invoking the psychotherapist-patient privilege also is evidenced by the fact that such an interpretation renders the President's prior promulgation of Mil. R. Evid. 513 a legal nullity. Specifically, under the court of appeals' interpretation of Rule 501(d), Rule 501(d) would prevent application of the privilege to any communication with a physician – even if the communication would otherwise be privileged under Rule 513 – because Rule 501(d) applies "*notwithstanding any other provision of these rules.*" Mil. R. Evid. 501(d) (emphasis added). Thus, the court of appeals' interpretation of Rule 501(d) as precluding any psychotherapist-patient privilege applies to Rule 513, as well as to Rule 501(a)(4).[13] While Rule 513 was not at issue in this case, the fact that the court of appeals' holding

---

[13] Given that Rule 513 addresses only the psychotherapist-patient privilege – as opposed to Rule 501(a)(4), which applies to all common law privileges – the court of appeals' interpretation of 501(d) nullifies Rule 513 in its entirety.

eviscerates Rule 513 demonstrates that its interpretation of Rule 501(d) in *Rodriguez* is erroneous and must be reversed.[14]

Given the significant dissent and the fact that the court of appeals could not muster even a plurality opinion in the case *sub judice*, this Court should have no confidence that the court of appeals' decision reflects the legally correct and appropriate decision for the military and its service members. This Court's deference should not be granted to the court of

---

[14] That the court of appeals' decision renders Rule 513 a nullity demonstrates that the court of appeals' interpretation of Rule 501(d) is wrong. First, such a result contravenes the long-standing doctrine of judicial deference to Congress and the President regarding the promulgation of courts-martial procedures. Second, such a result is inconsistent with the court of appeals' assertion that "[t]he purpose of the Military Rules was to provide predictability, clarity, and certainty." App., *infra*, 4a-5a. Far from clarifying matters, the court of appeals' interpretation of Rule 501(d) creates a situation in which Rules 513 is listed in the Military Rules of Evidence, but members of the U.S. military are precluded from invoking it. This is even worse, particularly given that this Court has observed that an "uncertain privilege" is "little better than no privilege at all," *Jaffee*, 518 U.S. at 18, because service members may well rely on the plain meaning of Rule 513 in determining what to tell their psychotherapists without realizing that the rule has no legal effect. Finally, such a result flouts one of the fundamental principles of interpretation of a legal scheme such as the Military Rules of Evidence: all provisions are to be given effect if a construction can be found to do so. *See generally* 2A Norman J. Singer, Sutherland Statutory Construction § 46:06 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another") (citations omitted). In this case, the only construction of the rules that would give effect to Rules 501 and 513 in their entirety is the conclusion that Rule 501(d) does not prevent service members from claiming the psychotherapist-patient privilege in trials by courts-martial.

appeals, but to Congress' decision that federal evidentiary rules shall apply to courts-martial proceedings whenever practicable and to the President's determination that federal common law privileges may be claimed in courts-martial proceedings.

Applying the federal common law psychotherapist-patient privilege to courts-martial proceedings is practicable.

The second exception to Mil. R. Evid. 501(a)(4) – that recognition of a common law privilege in courts-martial proceedings must be "practicable" – also does not apply to the psychotherapist-patient privilege. In fact, only one judge of the court of appeals stated that he was not persuaded that application of the psychotherapist-patient privilege in this case was "practicable." App., *infra*, 11a (Sullivan, J., concurring in part and in the result). Judge Sullivan based his views on the "exigencies of military service" and stated that because Specialist Rodriguez' statements were made in the context of a "suicide review," an exception to the privilege under Mil. R. Evid. 513 applied. *Id.* at 11a-12a. The exception cited by Judge Sullivan precludes application of the privilege "when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient[.]" *Id.* at 12a (citing Mil. R. Evid. 513(d)(4)).

Judge Sullivan's opinion relies on the application of Mil. R. Evid. 513, which did not exist at the time of and does not apply retroactively to Specialist Rodriguez' court-martial. Even so, there is no factual basis in the record to apply this exception to Mil. R. Evid. 513. First, Dr. Alfano did not testify that he believes that Specialist Rodriguez' mental or emotional condition makes him a danger to any person, including himself. In fact, Dr. Alfano testified that during the period in which he treated Specialist Rodriguez, Specialist

Rodriguez was "mentally stable" (Tr. at 73) and was not particularly depressed or psychotic. (Tr. at 93.) Moreover, the trial judge and the Army Court did not make a factual finding that Specialist Rodriguez constituted a danger to himself or others, thus precluding the court of appeals, which has no fact-finding power, from finding that this exception applies to Specialist Rodriguez' assertion of privilege. *Compare* 10 U.S.C. § 867(c) (court of appeals "shall take action only with respect to matters of law) *with* 10 U.S.C. § 866(c) (Army Court may affirm only such findings and sentence "as it finds correct in law and fact"); *see also United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (court of appeals may act only with respect to matters of law).

Application of a psychotherapist-patient privilege to courts-martial proceedings is practicable, at least within the limits prescribed by the President when he promulgated Mil. R. Evid. 513.[15] Congress mandated that procedural and evidentiary rules generally recognized by federal courts be applied to the conduct of courts-martial, unless the President determines that applying a specific rule would not be practicable. 10 U.S.C. § 836(a). "Thus, if there are military concerns that warrant a special rule for military tribunals, the statute gives [the President] ample authority to promulgate special rules that take such concerns into account." *United States v. Scheffer*, 523 U.S. 303, 323 (1998) (Stevens, J., dissenting). In this case, the President, as Commander in Chief, has taken special military concerns into account and determined that it is practicable to recognize a military psychotherapist-patient privilege by promulgating Mil. R. Evid. 513. In this context, Mil. R. Evid. 513 can be read to define the scope of the psychotherapist-patient privilege that

---

[15] Even if Mil. R. Evid. 513 represents the outer limits of "practicability," Specialist Rodriguez' assertion of privilege was practicable because, as explained *supra*, no exception to the Rule 513 privilege applied to the circumstances in Specialist Rodriguez' case.

would otherwise apply to the military by application of Mil. R. Evid. 501(a)(4).

CONCLUSION

The court of appeals' decision in the case *sub judice* is out of step with Congress, the President, this Court and all other federal courts. The divided court of appeals acted contrary to the rule of law in this case, and it did so in a manner that preempts the authority of Congress and the President to determine the rules by which courts-martial shall be conducted. The court of appeals has acted contrary to Congress' intent that federal evidentiary rules shall be applied to the military whenever practicable and has thwarted the determination of the President that federal common law privileges may be claimed in courts-martial proceedings pursuant to Rule 501(a)(4).

In so doing, the court of appeals has destabilized Congress' and the President's constitutional and statutory authority over the military and its justice system. The court of appeals' decision also precludes service members from enjoying the same rights as all other Americans, rights that Congress and the President determined service members should enjoy.

This Court should exercise its supervisory authority to ensure that Congress' and the President's acts are granted due deference and that Mil. R. Evid. 501(a)(4) is accorded full force and effect. This Court should exercise its supervisory authority to ensure that the military courts do not preempt the field rightfully occupied by Congress and the President.

The petition for a writ of certiorari should be granted.
Respectfully submitted.

MICHAEL J. NARDOTTI, JR.
Major General, U.S. Army, Retired

T. MICHAEL GUIFFRÉ
STEPHEN S. ANDERSON, JR.
NORAH D. MOLNAR
Attorneys

ADELE H. ODEGARD
Colonel, U.S. Army
Chief, Defense Appellate Division

JONATHAN F. POTTER
Major, U.S. Army
SEAN S. PARK
Captain, U.S. Army
ARUN J. THOMAS
Captain, U.S. Army
Attorneys

DECEMBER 2000

APPENDIX A

United States, Appellee v. Hector Rodriguez,
Specialist, U.S. Army, Appellant

No. 99-0224

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

54 M.J. 156

March 2, 2000, Argued
September 25, 2000, Decided

CRAWFORD, C.J., announced the judgment of the Court and delivered an opinion, in which EFFRON, J., joined. SULLIVAN, J., filed an opinion concurring in part and in the result. GIERKE, J., filed a dissenting opinion, in which COX, S.J., joined.

For Appellant: *T. Michael Guiffré* (argued); *Michael J. Nardotti, Jr.* and *Captain Donald P. Chisholm* (on brief); *Colonel John T. Phelps II*, *Colonel Adele H. Odegard*, and *Captain Kirsten V. Campbell-Brunson*.

For Appellee: *Captain Kelly D. Haywood* (argued); *Colonel Russell S. Estey, Lieutenant Colonel Eugene R. Milhizer,* and *Major Patricia A. Ham* (on brief).

Chief Judge CRAWFORD announced the judgment of the Court and delivered an opinion in which Judge EFFRON joined.

Contrary to his pleas, appellant was found not guilty by a military judge sitting alone of malingering but guilty of wounding himself without intent to avoid hazardous service, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. The convening authority approved the sentence of a dishonorable discharge, 354 days' confinement, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 49 M.J. 528 (1998). We

granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE TESTIMONY OF DR. JOSE ALFANO BASED ON THE ERRONEOUS FINDING THAT THE PSYCHOTHERAPIST PRIVILEGE WAS NOT APPLICABLE AT COURTS-MARTIAL.

We hold that the military judge did not err in admitting the statement of Dr. Alfano.

FACTS

On May 2, 1996, appellant rigged an automatic weapon to shoot himself in the stomach. He was successful. There was extensive evidence that appellant shot himself, including his admissions to his platoon leader and his platoon sergeant. He was transferred from Bosnia to Landstuhl Regional Medical Center in Germany for treatment. In addition to the physical treatment, he was treated by Dr. Alfano, a civilian psychiatrist. Dr. Alfano diagnosed appellant as having a dependent personality disorder. Appellant told Dr. Alfano "that he was not suicidal" but had intentionally discharged the weapon in an attempt to be reunited with his estranged wife in Baumholder, Germany.

"At trial, appellant's defense was that ... he abandoned his attempt to shoot himself but that the weapon accidentally fired while he was retrieving it. Appellant's defense counsel challenged the admissibility of appellant's statements to Dr. Alfano claiming they were protected by the federal psychotherapist-patient privilege recognized in *Jaffee v. Redmond*[,]" 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). *See* 49 M.J. at 529.

The military judge denied appellant's motion to suppress this evidence because under Mil.R.Evid. 501, Manual for Courts-Martial, United States (1998 ed.), and Article 36, UCMJ, 10 USC § 836, the federal psychotherapist-patient privilege "is not applicable" to the military.

DISCUSSION

The issue in this case is whether the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee* as being part of federal common law is applicable to trials by courts-martial. This issue requires consideration of the relationship between the Federal Rules of Evidence and the Military Rules of Evidence. n1

The Proposed Federal Rules of Evidence were submitted to the Supreme Court in October 1971. The Rules as originally approved by the Supreme Court on November 20, 1972, set forth in Article V nine nonconstitutional privilege rules applicable to federal trials, including a proposed psychotherapist-patient privilege. After these proposed Rules were sent to Congress, the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives held open hearings on the Proposed Rules. As a result of these hearings and numerous conferences, Congress did not accept the proposed privilege rules because a consensus could not be achieved as to a number of privileges. S. Rep. No. 1277, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S. Code Congressional & Administrative News 7051, 7052, 7053, 7058; *see also* Title 28 USCA Federal Rules of Evidence (Rules 701 to End) 614, 615, 620. Instead, Congress adopted Fed.R.Evid. 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The Rules, as revised by Congress, were approved by President Ford on January 2, 1975. Pub. L. No. 93-595, 88 Stat. 1926.

In contrast to the Federal Rules of Evidence, Congress has delegated to the President the authority to issue rules of evidence for courts-martial. *See* Art. 36. Under this authority, the President promulgated the Military Rules of Evidence in 1980, which were based upon the Federal Rules of Evidence, subject to exceptions based upon practicability and conformance with the Uniform Code of Military Justice. *See* Drafter's Analysis of Mil.R.Evid. 501,

Manual, *supra* (1998 ed.) at A22-37.

The President, in the Military Rules of Evidence, did not follow the approach taken by the Federal Rules of Evidence. Instead of a general rule allowing the courts to develop privileges through a common-law approach, *see* Fed.R.Evid. 501, the rules promulgated by the President used a combination of specific rules and a limited authority to incorporate common-law privileges. As noted in the Drafter's Analysis:

> Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Drafter's Analysis of Mil.R.Evid. 501, Manual, *supra* (1998 ed.) at A22-37. The privileges set forth by the President "provide the certainty and stability necessary for military justice." *Id.*

In *United States v. Scheffer*, 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998), the Supreme Court recognized that the President may promulgate rules of evidence for the military, which

> do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

523 U.S. at 308 (citations omitted); *see also id.* at 323 & n.4.

The purpose of the Military Rules was to provide predictability,

clarity, and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be. The addition of Mil.R.Evid. 501 is constitutional and an appropriate exercise of the President's authority under Article 36. We hold that Mil.R.Evid. 501 "is a rational and proportional means of advancing the legitimate interests of the military." *See* 523 U.S. at 312.

Mil.R.Evid. 501 provides in part:

> (a) A person may not claim a privilege with respect to any matter except as required by or provided for in:
> (1) The Constitution of the United States as applied to members of the armed forces;
> (2) An Act of Congress applicable to trials by courts-martial;
> (3) These rules or this Manual; or
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.
>
> * * *
>
> (d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Although the originally enumerated privileges contained within Mil.R.Evid. 502-509 establish the stability necessary for military justice, the President, in promulgating Mil.R.Evid. 501, provided a modest degree of flexibility in the application of federal common-law privileges to courts-martial. Drafter's Analysis of Mil.R.Evid. 501, Manual, *supra* (1998 ed.) at A22-37. Mil.R.Evid. 501(a)(4) adopts the privileges recognized at common law pursuant to Fed.R.Evid. 501, insofar as "practicable and not contrary to or inconsistent with" the Code, the Military Rules of Evidence, or the Manual for Courts-Martial. Appellant asserts that it is through this

subsection of Mil.R.Evid. 501 that the psychotherapist-patient privilege, recognized by the Supreme Court in *Jaffee*, became applicable to courts-martial. The Government argues that the psychotherapist privilege recognized in *Jaffee* cannot be adopted through Mil.R.Evid. 501(a)(4) because it is inconsistent with Mil.R.Evid. 501(d), which prevents application of a doctor-patient privilege to the military.

At the outset, it is necessary to review the state of the law when the President issued Mil.R.Evid. 501. Prior to *Jaffee*, "all 50 states and the District of Columbia" recognized "some form of psychotherapist privilege." 518 U.S. at 12. At the time of the adoption of the Military Rules of Evidence in 1980, the federal courts were divided on the existence of the privilege. Some refused to find the privilege under Fed.R.Evid. 501, n2 while others recognized the existence of the privilege. n3

The Court in *Jaffee* examined Fed. R. Evid. 501 which "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" 518 U.S. at 8. It observed that Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials[.]" While recognizing that a trial is a search for the truth, the Court acknowledged that public policy may require certain exemptions and exceptions to admissibility of evidence. *Id.* at 9. Public policy protects certain communications to encourage individuals to seek assistance, *e.g.*, the attorney-client privilege. Society should also encourage an individual to seek assistance from a psychotherapist, but such assistance would not be encouraged if there were not "an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." The importance of this privilege was recognized by the Judicial Conference Advisory Committee. *Id.* at 10. The Court noted that if the privilege was not recognized, "confidential conversations between psychotherapists and their patients would surely be chilled[.]" *Id.* at 11-12. The Court concluded that on the basis of "reason and experience," a psychotherapist privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10.

After analyzing application of the psychotherapist-patient privilege in the state and federal courts, the Supreme Court held that statements made by a police officer to a licensed clinical

social worker after a traumatic incident in which the officer shot and killed a man were inadmissible in a federal civil action brought by the family of the deceased.

Thus, *Jaffee* resolved the split in the federal courts. In reaching its decision, the majority reiterated that an "uncertain privilege" was "little better than no privilege at all." *Id.* at 18. The Court also recognized that the privilege was absolute, rejecting the balancing test applied by the Court of Appeals in the *Jaffee* case. *Id.* at 17. The Court concluded:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Id. at 18 n.19.

Prior to *Jaffee*, this Court did not recognize a psychotherapist privilege. *United States v. Mansfield*, 38 M.J. 415 (1993); *United States v. Toledo*, 25 M.J. 270 (1987). After *Jaffee* was decided, this Court stated in dicta in *United States v. English*, 47 M.J. 215, 216-17 (1997):

> Although the Manual for Courts-Martial does not recognize a general doctor-patient or psychotherapist-patient privilege, there is a limited privilege under Mil.R.Evid. 302 ... covering statements made during an examination into the mental condition of the accused under RCM 706.

(Footnote omitted.)

All of the service courts that have addressed this issue post-*Jaffee* (including this case) have recognized that the President has occupied the field and that Mil.R.Evid. 501(d) precludes application of doctor-patient or psychotherapist-patient privilege to the military. *United States v. Paaluhi*, 50 M.J. 782, 786 (NM Ct.Crim.App. 1999); *United States v. Rodriguez*, 49 M.J. 528 (Army Ct.Crim.App. 1998); *United States v. Stevens*, 1999 CCA LEXIS 198, 1999 WL 453948 (AF Ct.Crim.App. 1999).

The President's use of the term, "physician," in Mil.R.Evid. 501(d) includes psychiatrists and medical officers which include a broad range of military personnel who were not physicians,

including those who are psychotherapists. The psychotherapist privilege is not a privilege required by the Constitution of the United States. *See* Mil.R.Evid. 501(a)(1). Nor is it a privilege required by statute. *See* Mil.R.Evid. 501(a)(2). n4 Nor is it a privilege required by the Military Rules of Evidence or the Manual for Courts-Martial existing at the time of appellant's trial. *Cf.* Mil.R.Evid. 301-303, 502-509 (specific privileges required by the Rules and the Manual).

A psychotherapist-patient privilege would be contrary to and inconsistent with Mil.R.Evid. 501(d). As we have said, the term "physician" includes a psychiatrist. n5

The President adopted Mil.R.Evid. 513 on October 6, 1999. Executive Order No. 13140, § 2a, 64 Fed. Reg. 55116 (1999), effective for "communications made after 1 November 1999." 64 Fed. Reg. 55120. This Rule provides in pertinent part:

> Rule 513. Psychotherapist-patient privilege (a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

This Rule demonstrates the President's continued commitment to occupy the field by: (1) not relying on Mil.R.Evid. 501(a)(4); and (2) adopting a Rule that does not literally incorporate *Jaffee*. Instead, Mil.R.Evid. 513 applies a more limited approach to the statements of Dr. Alfano, a civilian psychiatrist/physician working for the military.

Rather than a case-by-case examination of the scope of the Rule as in the federal civilian sector, the President has set forth in detail the psychotherapist privilege for the military. This includes defining the holders of the privilege, the nature of the privilege, and the nature of privileged information. Mil.R.Evid. 513(b). Additionally, the Rule sets forth various exceptions, *e.g.*, spousal-child-abuse exception, Mil.R.Evid. 513(d)(2); danger exception, Mil.R.Evid. 513(d)(4); crime-fraud exception, Mil.R.Evid. 513(d)(5); and military-mission exception, Mil.R.Evid. 513(d)(6).

The Rule also sets forth the procedures to be applied in identifying what might be privileged, what is subject to *in camera* inspection, together with various notice provisions and what constitutes waiver. Mil.R.Evid. 513(e).

Appellant argues that because the President has now established a psychotherapist privilege without changing the language of Mil.R.Evid. 501(d), the term "physicians" used in that section must not have included "psychotherapists." On the contrary, the President established Mil.R.Evid. 513 as a separate rule from Mil.R.Evid. 501(d), creating a limited psychotherapist privilege, "based on the social benefit of confidential counseling recognized by *Jaffee*." 64 Fed. Reg. 55122 (Drafters' Analysis of Mil.R.Evid. 513). The approach taken by the dissent would lead to the following anomaly: (1) pre-*Jaffee* cases: no privilege; (2) immediate post-*Jaffee*/pre-Mil.R.Evid. 513 cases should have the benefit of full civilian *Jaffee* privilege; and (3) post-Mil.R.Evid. 513 cases: limited military privilege.

There is no reason that the cases falling in category (2) have the benefit of an unrestricted privilege. The approach we have taken recognizes that prior to *Jaffee* there was no privilege. Post-*Jaffee* and prior to adoption of Mil.R.Evid. 513, there was still no psychotherapist-patient privilege in the military because it was contrary to Mil.R.Evid. 501(d). When the President promulgated Mil.R.Evid. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military. In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court.

Therefore, we hold that the statements to Dr. Alfano, a medical doctor, were not privileged.

The decision of the United States Army Court of Criminal Appeals is affirmed.

----------Footnotes----------

n1 The Military Rules of Evidence are contained in Part III of the Manual for Courts-Martial, United States (1995 ed.)(the edition applicable at appellant's court-martial). The then-enumerated privileges that parallel the 1969 Proposed Federal Rules of Evidence, 46 F.R.D. 161 (1969), included: lawyer-client (Mil.R.Evid. 502); communication to clergy (Mil.R.Evid. 503); husband-wife (Mil.R.Evid. 504); and political vote (Mil.R.Evid 508).

n2 *See, e.g., United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir. 1994).

n3 *See, e.g., In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992).

n4 In contrast, Article 31, UCMJ, 10 USC § 831, does recognize the right to remain silent and the right not to be compelled to incriminate oneself.

n5 Dr. Alfano was a physician. The dissent's position is inconsistent, in that it recognizes that a psychiatrist is a physician, but then later asserts that Dr. Alfano was not working as a physician while working as a psychiatrist.

----------End Footnotes----------

SULLIVAN, Judge (concurring in part and in the result):

The question before us is whether appellant's June 1996 statements to Doctor Alfano (a civilian psychiatrist in government employment) were privileged and thus inadmissible at his court-martial in January of 1997. These statements were made by appellant while he was hospitalized at Landstuhl Regional Medical Center in Germany for a self-inflicted gunshot wound to his stomach which had earlier caused his transfer back from Bosnia where he was deployed. Doctor Alfano's purpose in treating appellant was to develop a disposition plan, *i.e.*, to determine whether he should be returned to duty or returned to the United States for further treatment. (R. 75) The doctor's primary focus was to determine appellant's level of "suicidality." (*id.*) The doctor testified that appellant said he was "not suicidal" but was "distressed" over his wife's "affair with another soldier" and wanted to return to Germany to get his family back together. (R.

75-76)

The lead opinion affirms the judge's denial of defense counsel's motion to suppress Doctor Alfano's testimony because it was privileged under *Jaffee v. Redmond*, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996). It does so on the basis that Mil. R. Evid. 501(d) at the time of appellant's statements and trial affirmatively precluded a privilege for statements made to a physician, including a psychiatrist like Doctor Alfano. Our case law applying Mil. R. Evid. 501(d) clearly supports the decisions of the lead opinion, the Court of Criminal Appeals, and the military judge on this legal question. *See United States v. Mansfield*, 38 M.J. 415, 418 (1993); *United States v. Tharpe*, 38 M.J. 8, 15 n.5 (1993); *United States v. Toledo*, 25 M.J. 270, 275 (1987) (pre-*Jaffee* cases); see also *United States v. Flack*, 47 M.J. 415, 417 (1998); *United States v. English*, 47 M.J. 215, 216-17 (1997) (post-*Jaffee* cases).

The dissenters, implicitly renouncing our case law, have concluded that Mil. R. Evid. 501(d) does not preclude a psychotherapist-patient privilege. *See generally United States v. Demmings*, 46 M.J. 877 (Army Ct. Crim. App. 1997). Moreover, relying on Mil. R. Evid. 501(a)(4) and *Jaffee v. Redmond, supra*, they conclude that a psychiatrist-patient privilege was "generally recognized in the trial of criminal cases in the United States" at the time of appellant's court-martial. ___ MJ at (1). In addition, the dissenters rely on Mil. R. Evid. 513, promulgated by the President in October 1999, well after appellant's trial, in concluding that application of this privilege at appellant's court-martial was "obviously . . . 'practicable'" (___ MJ at (1-2)) as required by Mil. R. Evid. 501(a)(4).

I am not persuaded by the dissenters that our prior case law (holding that Mil. R. Evid. 501(d) includes psychiatrists) should be overturned. *See United States v. Scalarone*, 54 M.J. 114 (2000) (discussing and applying the doctrine of *stare decisis*). Even if I were, I am not persuaded that application of such a privilege in appellant's case is "practicable" as additionally required by Mil. R. Evid. 501(a)(4). The President, in subsequently promulgating Mil. R. Evid. 513, which recognized a military psychotherapist-patient privilege, did so on a limited basis reflecting the exigencies of military service. He specifically provided exceptions where there is no privilege under this rule. One exception to application of this

privilege arises

> (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient[.]

In my view, appellant's case (a suicide review) fits in this category * and thus I conclude that no privilege existed even under the dissenters' approach to this case. Accordingly, I vote to affirm.

----------Footnotes----------

* The suicide review would equally be covered by Mil. R. Evid. 513(d)(6). It provides an exception which arises

> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission[.]

In the instant case, the review by Dr. Alfano was to determine whether to return appellant to Bosnia or to send him back to the United States for treatment.

----------End Footnotes----------

GIERKE, Judge, with whom COX, Senior Judge, joins (dissenting):

The Supreme Court, the President, all 50 States, and the District of Columbia all agree that communications between a psychiatrist and a patient are privileged. Mil. R. Evid. 513; *Jaffee v. Redmond*, 518 U.S. 1, 12, 135 L. Ed. 2d 337, 116 S. Ct. 1923 and n. 11 (1996). Nevertheless, because Specialist Rodriguez had the misfortune of consulting with Dr. Alfano before November 1, 1999, the effective date of Mil. R. Evid. 513, the majority denies him the benefit of the privilege. The majority hangs its hat on Mil. R. Evid. 501(d) and holds that the President has "occupied the field" by making communications with "a medical officer or civilian physician" unprivileged. I strongly disagree.

In my view, the majority's decision is contrary to the common law as well as Article 36, UCMJ, 10 USC § 836, and Mil. R. Evid.

501(a)(4), which enjoin courts-martial to follow "principles of common law generally recognized in the trial of criminal cases in United States district courts pursuant to rule 501 of the Federal Rules of Evidence," to the extent practicable. Those "principles of common law" recognize the privilege between a psychiatrist and a patient. *See Jaffe v. Redmond, supra.* Obviously, recognition of the privilege has been determined by the President to be "practicable," because he expressly made it applicable to courts-martial by promulgating Mil. R. Evid. 513.

The majority concludes that because Dr. Alfano is also a physician, Mil. R. Evid. 501(d) is dispositive. The majority overlooks the fact that appellant's disclosures to Dr. Alfano were in his capacity as a psychiatrist, not as a physician. A "psychiatrist" is defined as "[a] physician especially learned in psychiatry." 5 J. E. Schmidt, *Attorneys' Dictionary of Medicine* 514 (1999). The fact that Dr. Alfano is a physician does not remove the privilege, any more than it would remove the privilege from a communication with a lawyer or a clergyman who also happened to be a physician. The critical issue is the capacity in which the communication was received, not the curriculum vitae of the recipient.

The Supreme Court recognized in *Jaffee* that there is a fundamental difference between treatment by a physician and a psychiatrist. The Supreme Court explained how the two differ:

> Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears . . . .

518 U.S. at 10. When the President promulgated Mil. R. Evid. 513, he did not find it necessary to modify or further define the terms "medical officer" or "civilian physician" in Mil. R. Evid. 501(d), strongly suggesting that he did not find the language of Mil. R. Evid. 513 inconsistent with Mil. R. Evid. 501(d).

In my view, appellant's communications to Dr. Alfano do not fall under the "medical officer" or "physician" exceptions in Mil.

R. Evid. 501(d). In the Army, the term "medical officer" applies only to commissioned and warrant officers of the Army Medical Department. *See generally* Army Regulation 40-1, Composition, Mission, and Functions of the Army Medical Department (1 July 1983). Because Dr. Alfano is a civilian, he is not a "medical officer." With regard to the "physician" exception, Dr. Alfano was not working as a "physician," but as a "psychiatrist." Thus, Mil. R. Evid. 501(d) is inapplicable to this case.

In my view, there is no justification in law or policy for denying appellant the protection of the common-law privilege recognized by the Supreme Court in *Jaffee*. I would hold that under Mil. R. Evid. 501(a)(4), appellant was entitled to invoke that common-law privilege. The majority denies him that right. Accordingly, I dissent.

APPENDIX B

United States, Appellee v. Specialist Hector Rodriguez, United States Army, Appellant

No. 9700189

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

49 M.J. 528

October 30, 1998, Decided

Before TOOMEY, CARTER, and NOVAK, Appellate Military Judges. Senior Judge TOOMEY and Judge NOVAK concur.

OPINION OF THE COURT

CARTER, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of intentionally inflicting an injury upon himself in a hostile fire pay zone, without intent to avoid service, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for 354 days, forfeiture of all pay and allowances, and reduction to Private E1. This case is before the court for automatic review under Article 66, UCMJ.

The issue presented is whether the psychotherapist-patient privilege recognized by the United States Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), as being part of the federal common law, is applicable to trials by courts-martial. For the reasons discussed herein, our answer is no. We hold that a federal common law psychotherapist-patient privilege, without specifically tailored parameters and exceptions necessary in a military environment, is not "practicable" in trials by court-martial. UCMJ art. 36(a) and Military Rule of Evidence 501(a)(4) [hereinafter Mil. R. Evid.],

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter MCM]. We also hold that even if a general, unrestricted *Jaffee* privilege were practicable in the military, it is still "contrary to or inconsistent with" the language of Mil. R. Evid. 501(d) as applied to a psychiatrist employed by the military.

Facts

Appellant deployed with his unit to Bosnia in support of Operation Joint Endeavor. In the spring of 1996, appellant's wife told him during a telephone conversation that she wanted a divorce. Appellant asked for and was denied leave to visit his wife in Germany to reconcile their marriage. n1 Appellant's chain of command, his chaplain, and a combat stress evaluation team held numerous counseling sessions with appellant, including psychiatric counseling. n2

On 2 May 1996, appellant wrote two "suicide letters," one addressed to his command and one to his wife. Appellant also prepared an audio tape recording for his wife. Appellant then went to an empty bunker, loaded one round into his M249 squad automatic weapon, tied a cord to the trigger, and propped the weapon up facing him, preparing to shoot himself. The weapon subsequently discharged, shooting appellant in the abdomen.

Appellant was evacuated to Landstuhl Regional Medical Center in Germany for medical treatment. During this medical treatment, appellant spoke with Dr. Alfano, a psychiatrist and GS-13 federal civilian physician. Appellant told Dr. Alfano that he wanted to cause some injury to himself but did not realize that it would be so serious. Appellant also stated that he wanted to go home to his wife and straighten things out with her.

At trial, appellant's defense was that at the last minute he abandoned his attempt to shoot himself but that the weapon accidentally fired while he was retrieving it. Appellant's defense counsel challenged the admissibility of appellant's statements to Dr. Alfano claiming they were protected by the federal psychotherapist-patient privilege recognized in *Jaffee v. Redmond*. The military judge ruled that under Mil. R. Evid. 501 and Article 36, UCMJ, the federal psychotherapist-patient privilege is not applicable in the military, at least for a military psychiatrist.

Jaffee v. Redmond

Unlike the Military Rules of Evidence, the Federal Rules of Evidence [hereinafter Fed. R. Evid.] enumerate no specific

privileges. Instead, Fed. R. Evid. 501, n3 a general privilege rule, "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee*, 518 U.S. at 11, 116 S. Ct. at 1927. Using this authority, the Supreme Court held that confidential communications made between a licensed psychiatrist or psychologist and a patient, in the course of that patient's diagnosis or treatment, are protected from compelled disclosure under Fed. R. Evid. 501. The Court also extended this privilege to confidential communications made to licensed social workers in the course of psychotherapy treatment. 518 U.S. at 25; 116 S. Ct. at 1931.

Prior Military Case Law

Several military cases have commented, in dicta, on the applicability of a psychotherapist-patient privilege to the military. In a 1993 decision predating *Jaffee*, a unanimous, five-member United States Court of Military Appeals, relying on Mil. R. Evid. 501(d) and the analysis thereto, stated that "there is no physician-patient or psychotherapist-patient privilege in federal law, including military law." *United States v. Mansfield*, 38 M.J. 415, 418 (C.M.A. 1993).

In July 1997, this court discussed the psychotherapist-patient privilege in detail and suggested that *Jaffee* could apply to courts-martial, but did not decide the issue because the matter was waived in that case. *United States v. Demmings*, 46 M.J. 877, 883 (Army Ct. Crim. App. 1997).

In September 1997, in a post-*Jaffee* case, the United States Court of Appeals for the Armed Forces stated that the "Manual for Courts-Martial does not recognize a general doctor-patient or psychotherapist-patient privilege." *United States v. English*, 47 M.J. 215, 216-17 (1997). The court cited Mil. R. Evid. 501(d), the contrary *Jaffee* decision, and the President's proposed change to the Military Rules of Evidence incorporating a limited psychotherapist-patient privilege. n4 *English*, 47 M.J. at 216-17 n.2; *accord United States v. Flack*, 47 M.J. 415, 417 (1998). However, neither *English* nor *Flack* decided whether *Jaffee* applies in courts-martial because the question was not at issue in those cases. Accordingly, we find that this appellant's case presents an issue of first impression in the armed forces.

Standard of Review

Counsel for both parties argue that our standard of review is

abuse of discretion because this case involves a trial judge's ruling admitting evidence. We disagree. In our judgment, the issue of whether *Jaffee* applies in the military is purely a legal question. Accordingly, our standard of review is de novo. *United States v. Padgett*, 48 M.J. 273, 277 (1998); *United States v. Ayala*, 43 M.J. 296, 298 (1995).

Background

In 1972, the Supreme Court recommended the adoption of nine specific rules of privilege for federal trials, including a psychotherapist-patient privilege. *Jaffee*, 518 U.S. at 13, 116 S. Ct. at 1927 n.7. Congress considered but rejected the Supreme Court's recommendation because the rules were too controversial. The psychotherapist-patient privilege was one of the most controversial. *See* STEPHEN A. SALTZBURG ET AL, FEDERAL RULES OF EVIDENCE MANUAL 333-34, 416-20, and 1105-30 (4th ed. 1986) [hereinafter SALTZBURG, FEDERAL RULES].

While Congress retained for itself the authority to promulgate rules of evidence for trials in federal courts, it expressly granted this authority to the President in Article 36(a), UCMJ, for trials by court-martial:

> Pretrial, trial, and post-trial procedures, *including modes of proof*, . . . may be prescribed by the President by regulations which shall, *so far as he considers practicable,* apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(Emphasis added.)

The President used this statutory authority to promulgate the Military Rules of Evidence. The analysis to the Military Rules of Evidence explains the intent of the rules regarding privileges:

> Section V combines the flexible approach taken by Congress with respect to privileges with that provided in the 1969 Manual. Rules 502-509 set forth *specific rules of privilege to provide the certainty and stability necessary for military justice.* Rule 501, on the other hand, adopts those privileges recognized in common law pursuant to

> Federal Rules (sic) of Evidence 501 *with some limitations*. Specific privileges are generally taken from those proposed Federal Rules of Evidence which although not adopted by Congress *were non-controversial*, or from the 1969 Manual. n5

Both parties agree that the Military Rules of Evidence do not list a psychotherapist-patient privilege as one of the specifically enumerated privileges recognized in the military. *See* Mil. R. Evid. 502-509. n6 However, they disagree on two points: (1) whether it is practicable to incorporate the *Jaffee* decision into military practice as part of the federal common law under Mil. R. Evid 501(a)(4); and, if so, (2) whether a psychotherapist-patient privilege is contrary to or inconsistent with the language of Mil. R. Evid. 501(d) barring a doctor-patient privilege in courts-martial.

Military Rule of Evidence 501(a)(4)

Military Rule of Evidence 501(a)(4) states:

> (a) A person may not claim a privilege with respect to any matter except as required by or provided for in:
>
> . . . .
>
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence *insofar as the application of such principles* in trials by courts-martial *is practicable* and *not contrary to or inconsistent* with the code, these rules, or this Manual.

(Emphasis added.)

Practicability

The Supreme Court has historically recognized that "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). The armed forces of the United States exist to safeguard the Nation's security, and, if necessary, to fight and win the Nation's wars. Military necessity dictates "a respect for duty and a discipline without counterpart in civilian life." *Schlesinger v. Councilman*, 420 U.S. 738, 757, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975). Similarly, military law is founded upon these "unique military exigencies." *Id.* "Military law . . . is a

jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, 346 U.S. 137, 140, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953).

The Constitution entrusts to Congress the responsibility of balancing the rights of soldiers with military readiness. *Id.* The Congress, in turn, entrusts to the President, as Commander-in-Chief of the armed forces, the responsibility to establish rules of evidence for courts-martial. UCMJ art. 36(a); *cf. United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 1264 n.2, 140 L. Ed. 2d 413 (1998). The reason is fairly simple: courts-martial, as important as they may be, are incidental to the Army's primary fighting function. "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *United States ex. rel. Toth v. Quarles,* 350 U.S. 11, 17, 100 L. Ed. 8, 76 S. Ct. 1 (1955).

The analysis to Mil. R. Evid. 501 explains the impracticability of blind application of federal rules of evidence in a military environment.

The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyers (sic) investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not. n7

Unlike the general privilege in the Federal Rules of Evidence, the privileges created by the Military Rules of Evidence have to be understood, interpreted, and applied in various proceedings by non-lawyers. Specifically, non-lawyers regularly apply the military privilege rules in three important areas: (1) Article 32, UCMJ, pretrial investigation hearings; (2) proceedings for search

authorizations; and (3) proceedings involving pretrial restraint. Mil. R. Evid. 1101(b) and (d).

The *Jaffee* decision itself leaves the definition of the scope of, and exceptions to, this new privilege for future cases. n8 This approach works well in the federal courts where case-by-case decisions are made by judges after research and argument from counsel on both sides. However, it simply is not practicable, nor is it fair to an accused, to expect non-attorneys to uniformly and accurately apply a general, undefined *Jaffee* privilege in a military environment.

Military privilege law absolutely must accommodate legitimate issues of military necessity. An unrestricted *Jaffee* privilege could endanger the safety and security of military personnel. Commanders deprived of critical mental health information concerning emotionally troubled subordinates could unknowingly jeopardize the lives of their subordinates and the accomplishment of their military missions.

Even the *Jaffee* court recognized that any psychotherapist-patient privilege must yield if a patient poses a serious threat of harm to himself or others. n9 Members of the uniformed services control the firing mechanisms of a vast arsenal of killing devices, including hand held automatic weapons, tanks, artillery, attack aircraft, and cruise missiles. Some of these delivery systems have nuclear munitions. There must be absolutely no question in such an environment that any information obtained from a military patient by a psychotherapist indicating that such a patient might be dangerous to himself or others is not privileged.

We hold that until the President expressly exercises his authority under Article 36(a), UCMJ, there is no general, unrestricted *Jaffee* privilege in the Army because it is not "practicable" under Mil. R. Evid. 501(a)(4).

Military Rule of Evidence 501(d)

Assuming arguendo that recognizing and applying an unrestricted *Jaffee* psychotherapist-patient privilege is practicable, we hold that the language of Mil. R. Evid. 501(d) bars the application of a *Jaffee* psychotherapist-patient privilege in courts-martial, at least for psychiatrists employed by the armed forces.

Military Rule of Evidence 501(d) provides that "notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis

that it was acquired by a medical officer or civilian physician in a professional capacity." The analysis states that "rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel." MCM, app. 22, Mil. R. Evid. 501 analysis, at A22-37.

When interpreting the language of Mil. R. Evid 501(d), we rely on two points that are not in dispute. First, there is no *doctor-patient* privilege in the military. Second, the President did not intend to incorporate into military law in 1980 the then very controversial *psychotherapist-patient* privilege.

Appellant argues that Mil. R. Evid. 501(d) only precludes application of a doctor-patient privilege, not a psychotherapist-patient privilege. He claims the psychotherapist-patient privilege is completely separate from a doctor-patient privilege. We cannot agree. In our judgment, a psychotherapist-patient privilege is a narrower version of a broader doctor-patient privilege. n10 Dr. Alfano was both a doctor and a psychiatrist. In fact, a "psychiatrist" is defined as "a physician specializing in psychiatry." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1832, UNABRIDGED (1981). Even under a *Jaffee* analysis, appellant's statements to Dr. Alfano are only privileged if appellant made them to Dr. Alfano during diagnosis or treatment. In other words, the physician (Dr. Alfano) must have "acquired" the information "in a professional capacity" (during appellant's diagnosis or treatment). This is precisely what the language in Mil. R. Evid. 501(d) prohibits.

In the alternative, appellant argues that we need not interpret Mil. R. Evid. 501(d) in this case because, by its own terms, it only applies to information "not otherwise privileged." n11 Appellant argues that the *Jaffee* decision is incorporated into military practice as part of the federal common law under Mil. R. Evid. 501(a)(4) and that the psychotherapist-patient privilege is thus "otherwise privileged." Appellant's argument is neither logical nor persuasive. If the Supreme Court issued a new decision recognizing a complete doctor-patient privilege under federal common law, that decision would apply to courts-martial under appellant's argument, notwithstanding Mil. R. Evid. 501(d). Yet, even appellant concedes, that, at a minimum, Mil. R. Evid. 501(d)

bars a doctor-patient privilege in courts-martial.

Accordingly, we hold that appellant's assertion that Dr. Alfano's testimony was privileged under *Jaffee* as a common law privilege by operation of Mil. R. Evid. 501(a)(4) is invalid because it is specifically "contrary to [and] inconsistent with" the language of Mil. R. Evid. 501(d). Mil. R. Evid. 501(a)(4).

Decision

We have considered appellant's remaining assignments of error and the matters asserted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. The findings of guilty and the sentence are affirmed.

Senior Judge TOOMEY and Judge NOVAK concur.

----------Footnotes----------

n1 Appellant had been granted one month's emergency leave from Bosnia only three months earlier to attend a funeral with his wife in the United States.

n2 Appellant was removed temporarily from his unit and placed in a combat stress medical unit. After evaluation and treatment, appellant was returned to his unit for duty.

n3 Federal Rule of Evidence 501 provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

n4 The proposed Mil. R. Evid. change to incorporate a limited psychotherapist-patient privilege was published in the Federal Register on 6 May 1997, at 62 Fed. Reg. 24,643, and reprinted in *The Army Lawyer* in May 1998, at 22-24.

n5 MCM, app. 22, Mil. R. Evid 501 analysis, at A22-36 (emphasis added).

n6 "Section V contains all of the privileges applicable to

military criminal law except for those privileges which are found within Rules 301, Privilege Concerning Compulsory Self-Incrimination; Rule 302, Privilege Concerning Mental Examination of an Accused; and Rule 303, Degrading Questions." MCM, app. 22, Mil. R. Evid. 501 analysis, at A22-36.

n7 MCM, app. 22, Mil. R. Evid 501 analysis, at A22-36.

n8 A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area." *Jaffee*, 518 U.S. at 28, 116 S. Ct. at 1932.

n9 Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist. *Jaffee*, 518 U.S. at 28, 116 S. Ct. at 1932 n.19.

n10 Professor Saltzburg notes that the Supreme Court Advisory Committee "rejected the traditional physician-patient privilege (which two-thirds of the states had) and substituted a narrower privilege dealing with psychotherapists." *See* SALTZBURG, FEDERAL RULES at 333.

n11 If the President does implement a change to the Military Rules of Evidence recognizing a psychotherapist-patient privilege in the military, information obtained under such a change would be "otherwise privileged" within the meaning of Mil. R. Evid. 501(d).

----------End Footnotes----------

APPENDIX C

1. Article II, § 2, of the United States Constitution provides in pertinent part:

The President shall be Commander in Chief of the Army and Navy of the United States…

2. 10 U.S.C. § 836(a) provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

3. The Military Rules of Evidence provide in pertinent part:

PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

* * *

(d) Notwithstanding any other provision of these rules,

information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

* * *

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by

the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military

judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

4. The Manual for Courts-Martial (MCM), United States (2000 ed.), app. 22, Analysis of the Military Rules of Evidence, provides in pertinent part:

PRIVILEGES

Rule 501. General rule

Section V contains all of the privileges applicable to military criminal law except for those privileges which are found within Rules 301, Privilege Concerning Compulsory Self-Incrimination; Rule 302, Privilege Concerning Mental Examination of an Accused; and Rule 303, Degrading Questions. Privilege rules, unlike other Military Rules of Evidence, apply in "investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence under Article 72; proceedings for search authorization; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice of this Manual and not listed in rule 1101(a)." *See* Rule 1101(c); *see also* Rule 1101(b).

In contrast to the general acceptance of the proposed Federal Rules of Evidence by Congress, Congress did not accept the proposed privilege rules because a consensus as to the desirability of a number of specific privileges could not be achieved. *See* generally, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 200–201 (2d ed. 1977). In an effort to expedite the Federal Rules generally, Congress adopted a general rule, Rule 501, which basically provides for the continuation of common law in the privilege area. The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-

martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Section V combines the flexible approach taken by Congress with respect to privileges with that provided in the 1969 Manual. Rules 502–509 set forth specific rules of privilege to provide the certainty and stability necessary for military justice. Rule 501, on the other hand, adopts those privileges recognized in common law pursuant to Federal Rules of Evidence 501 with some limitations. Specific privileges are generally taken from those proposed Federal Rules of Evidence which although not adopted by Congress were non-controversial, or from the 1969 Manual.

Rule 501 is the basic rule of privilege. In addition to recognizing privileges required by or provided for in the Constitution, an applicable Act of Congress, the Military Rules of Evidence, and the Manual for Courts-Martial, Rule 501(a) also recognizes privileges "generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual." The latter language is taken from 1969 Manual Para. 137. As a result of Rule 501(a)(4), the common law of privileges as recognized in the Article III courts will be applicable to the armed forces except as otherwise provided by the limitation indicated above. Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. *See* 1969 Manual Para. 151 *c*

It should be noted that the law of the forum determines the application of privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial. Subdivision (b) is a non-exhaustive list of actions which constitute an invocation of a privilege. The subdivision is derived from Federal Rule of Evidence 501 as originally proposed by the Supreme Court, and the four specific actions listed are also found in the Uniform Rules of Evidence. The list is intentionally non-exclusive

as a privilege might be claimed in a fashion distinct from those listed.

Subdivision (c) is derived from Federal Rule of Evidence 501 and makes it clear that an appropriate representative of a political jurisdiction or other organizational entity may claim an applicable privilege. The definition is intentionally non-exhaustive.

1999 Amendment: The privileges expressed in Rule 513 and Rule 302 and the conforming Manual change in R.C.M. 706, are not physician-patient privileges and are not affected by Rule 501(d).

* * *

Rule 513. Psychotherapist-patient privilege

1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security. *See Parker v. Levy*, 417 U.S. 733, 743 (1974); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Dept. of the Navy v. Egan*, 484 U.S. 518, 530 (1988). There is no intent to apply Rule 513 in any proceeding other than those authorized under the UCMJ. Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence. Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is

still no physician-patient privilege for members of the Armed Forces. *See* the analyses for Rule 302 and Rule 501.

(a) *General rule of privilege.* The words "under the UCMJ" in this rule mean Rule 513 applies only to UCMJ proceedings, and do not limit the availability of such information internally to the services, for appropriate purposes.

(d) *Exceptions* These exceptions are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment. Therefore, psychotherapists are to provide such information despite a claim of privilege.